

**UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS**

UNITED STATES OF AMERICA,

v.

GREGORY COLBURN et al.,

Defendants.

Case No. 1:19-cr-10080-NMG

**RESPONSE TO GOVERNMENT'S SUPPLEMENTAL
NOTICE REGARDING 18 U.S.C. § 666 AND "OFFICIAL ACTS"**

Pursuant to Fed. R. Crim. P. 30, and in response to the Government's Supplemental Notice Regarding 18 U.S.C. § 666 and "Official Acts," ECF No. 2357 (the "Notice"), Defendants Gamal Abdelaziz and John Wilson ("Defendants") hereby reaffirm their position that § 666 requires proof of an official act. The First Circuit spoke directly on this issue in *United States v. Martinez*, holding as follows:

To convict López on Count Eleven, which was for federal programs bribery in violation of 18 U.S.C. § 666, the government was required to prove, among other things, that López accepted a thing of value while 'intending to be influenced' by it **to perform an official act**.

United States v. Martinez, 994 F.3d 1, 6-7 (1st Cir. 2021) (emphasis added). This holding binds the Court. And, even assuming that this statement is dicta, it is "so direct and on point that a proper respect for the opinions of the First Circuit requires this Court to follow it." *Awuah v. Coverall N. Am., Inc.*, 985 F. Supp. 2d 185, 190 (D. Mass. 2013).

In addition, in the Notice, the government states that *Martinez* "pre-dated the Solicitor General's brief and the Supreme Court's denial of certiorari in *Ng Lap Seng*." Notice at 3. This is simply not correct. The Solicitor General filed this brief in June 2020, and the Supreme Court denied cert that same month. See *Ng Lap Seng v. United States*, 141 S. Ct. 161 (2020); *Ng Lap*

Seng v. United States, Brief of the United States, 2020 WL 3027671 (June 2020). The First Circuit decided *Martinez* on April 7, 2021, almost a year later.¹

In any event, even before the First Circuit decided *Martinez*, this Court had already recognized that § 666 requires proof of an official act. *See, e.g., United States v. Sidoo*, 468 F. Supp. 3d 428, 444 (D. Mass. 2020) (discussing federal programs bribery and conspiracy to commit federal programs bribery charges, and stating that “[f]or a payment to constitute a bribe, there must be a quid pro quo — a specific intent to give or receive something of value in exchange for an official act” (internal quotation marks omitted)); *accord United States v. Ernst*, 502 F. Supp. 3d 637, 665 (D. Mass. 2020). The Court should not change its position, particularly where the First Circuit has expressly recognized that § 666 requires proof of an official act.

Respectfully submitted,

/s/ Brian T. Kelly

Brian T. Kelly (BBO No. 549566)
 Joshua C. Sharp (BBO No. 681439)
 Lauren M. Maynard (BBO No. 698742)
 NIXON PEABODY LLP
 53 State Street
 Boston, MA 02109
 617-345-1000
 bkelly@nixonpeabody.com
 jsharp@nixonpeabody.com
 lmaynard@nixonpeabody.com

Counsel for Gamal Abdelaziz

/s/ Michael Kendall

Michael Kendall (BBO #544866)
 Lauren M. Papenhausen (BBO #655527)
 WHITE & CASE LLP
 75 State Street
 Boston, MA 02109-1814
 (617) 979-9310
 michael.kendall@whitecase.com
 lauren.papenhausen@whitecase.com

Andrew E. Tomback (*pro hac vice*)
 MC LAUGHLIN & STERN
 260 Madison Avenue
 New York, NY 10016
 (212) 448-1100
 atomback@mclaughlinstern.com

Counsel for John Wilson

DATED: October 6, 2021

¹ In any case, it is not clear to Defendants why the Court should follow a brief from the Solicitor General over the First Circuit.

CERTIFICATE OF SERVICE

I, Michael Kendall, hereby certify that on October 6, 2021 this document, filed through the CM/ECF system, will be sent electronically to all registered participants in this matter as identified on the Notice of Electronic Filing (NEF).

/s/ Michael Kendall